BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

Rail Transportation Contracts Under 49 U.S.C. 10709

COMMENTS

submitted by

AMERICAN CHEMISTRY COUNCIL
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.
EDISON ELECTRIC INSTITUTE
THE FERTILIZER INSTITUTE
THE NATIONAL GRAIN AND FEED ASSOCIATION
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
MONTANA WHEAT & BARLEY COMMITTEE
IDAHO WHEAT COMMISSION
IDAHO BARLEY COMMISSION
WASHINGTON WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
ALLIANCE FOR RAIL COMPETITION

Due and Dated: February 5, 2009

By their representatives:

Vincent P. Szeligo
Wick, Streiff, Meyer
O'Boyle & Szeligo
1450 Two Chatham Center
Pittsburgh PA 15219
Attorney for the U.S. Clay Producers Traffic Association, Inc.

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney and Harkaway
2175 K St. N.W.
Washington, D.C. 20006
Attorneys for the National Grain and Feed Association

Thomas Schick
Senior Director
American Chemistry Council
1300 Wilson Blvd.
Arlington, VA 22209

Scott Stone
Patton, Boggs and Blow
2550 M. St. N.W.
Washington, D.C. 20037
Attorney for the American Chemistry Council

Nicholas J. DiMichael
Karyn A. Booth
Jeffrey O. Moreno
Thompson Hine LLP
1920 N. St. N.W.
Washington, D.C.
Attorneys for The Fertilizer Institute and The National Industrial Transportation League

Michael F. McBride
Van Ness Feldman P.C.
1050 Thomas Jefferson St. N.W., Suite 700
Washington, D.C. 20007
Attorney for the Edison Electric Institute

Terry Whiteside
Whiteside and Associates
3203 3rd Ave. No, Suite 301
Billings, Montana 59101
Representative of Montana Wheat & Barley Committee, Idaho Wheat Commission, Idaho Barley Commission, Washington Wheat Commission, South Dakota Wheat Commission, Nebraska Wheat Board, Oklahoma Wheat Commission, Texas Wheat Producers Board, Colorado Wheat Administrative Committee, and the Alliance for Rail Competition

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Come now the American Chemistry Council ("ACC"), the U.S. Clay Producers Traffic Association, Inc. ("Clay Producers"), the Edison Electric Institute ("EEI"), The Fertilizer Institute ("TFI"), the National Grain and Feed Association ("NGFA"), and The National Industrial Transportation League ("NITL"), the Montana Wheat and Barley Committee, the Idaho Wheat Commission, the Washington Wheat Commission, the Nebraska Wheat Board, the Oklahoma Wheat Commission, the Texas Wheat Producers Board, the Colorado Wheat Administrative Committee, and the Alliance for Rail Competition (collectively, "Interested Associations"), and submit their Comments in this proceeding. These Comments are submitted

in response to the Notice of Proposed Rulemaking ("NPR") served January 6, 2009 , in which the Surface Transportation Board ("STB" or "Board") is proposing to amend its rules to provide that: (1) where an agreement for rail carriage contains a disclosure statement set forth in the NPR, the Board will not find jurisdiction over a dispute involving the rate or service and will treat that agreement as a rail transportation contract under 49 U.S.C. 10709; and, (2) where an agreement fails to contain the disclosure statement, the Board will find jurisdiction over the involved dispute, absent clear and convincing evidence.

As set forth in these Comments, these Interested Associations are strongly opposed to the proposed rule. The Board should terminate this proceeding.

I. IDENTIFICATION OF INTEREST

A. American Chemistry Council

The American Chemistry Council represents the leading companies engaged in the business of chemistry. Products supplied by the chemistry sector are essential in manufacturing, agriculture, energy, transportation, technology, communications, health, education, defense, and virtually every aspect of our lives. Basic industrial chemicals are the raw materials for thousands of other products including plastics, water treatment chemicals, detergents, pharmaceuticals and agricultural chemicals. These applications include medicines and medical technologies that save our lives, computers that expand our horizons, foods we eat, water we drink, cars we drive, homes in which we live, and the clothes we wear. The business of chemistry depends on the nation's railroads to deliver approximately 170 million tons of products each year, accounting for more than $6 billion in annual railroad freight revenues, making chemicals the second-largest railroad commodity, behind only coal, in terms of volume, and third-largest revenue contributor to rail revenues, behind only coal and intermodal.

B. U.S. Clay Producers Traffic Association, Inc.

The U.S. Clay Producers Traffic Association, Inc. is a non-profit association of member companies engaged in producing and shipping clay in all modes of transportation from Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed over 50 years ago to provide information to members concerning the transportation of clay, and also as a forum for discussion of developments and information concerning regulation by governing authorities affecting the transportation of clay. The Association has also historically represented the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of the Clay Producers represent approximately 95% of the industry in terms of total clay shipments and move clay from a relatively concise geographic area in Georgia, South Carolina and Tennessee, where the mineral deposits are found, to customers located throughout the United States, Canada, Mexico, and the rest of the world. Clay Producers' clay traffic is captive to the railroads due to the bulk nature of their shipments originating from such a small, mostly rural, geographic area. The clay industry is a major factor in the economy of the small geographic area where it is produced.

C. Edison Electric Institute

EEI is the association of U.S. shareholder-owned electric companies. Its members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70% of the U.S. electric power industry. It also has as Affiliate members more than 65 international electric companies and as Associate members, more than 170 industry suppliers and related organizations.

Coal represents more than 50% of the fuel used for the production of electricity. Most of that coal moves from mine to power plant, in whole or in part, by rail. Rail rates constitute a large percentage of both the delivered cost of coal and of the cost of electricity to the consumers. It is important that the Board maintain vigilant oversight of rail rates for coal and other commodities as to which there is no effective competition for the transportation involved.

D. The Fertilizer Institute

TFI is the national trade association of the fertilizer industry whose membership consist of fertilizer producers, importers, retailers, wholesalers and others involved in the business of fertilizer. The mission of TFI is to represent, promote and protect the fertilizer industry. Fertilizer nutrients provide the "food" that plants need to grow and insure there is an adequate supply of nutritious food and animal feed, and a bountiful supply of fiber as well as biofuels to help meet the nation's food security and energy needs. Many TFI members ship via rail, and therefore have a strong interest in rules and regulations applying to the carriage of goods by rail.

E. The National Grain and Feed Association

NGFA is the nationwide organization comprised of some 900 companies engaged in the shipment or production of grain, grain products, animal feeds, and bio-fuels, both domestically and for export. Its members make extensive use of rail service, in most instances as shippers or receivers of bulk shipments moving over long distances between origins and destinations that are served by a single railroad and for which there is no practical or economic transportation alternative. Since rail transportation contracts were recognized by statute, NGFA members have entered into thousands of such contracts in addition to using rail common carrier service.

F. The National Industrial Transportation League

The League is the nation's oldest and largest association of companies interested in transportation. Its 600-plus members range from some of the largest companies in the nation to much smaller enterprises. Many members of the League ship via rail, and are vitally interested in the rates and service of the nation's rail industry. League members also substantially ship via other modes, both domestically and internationally. Shipments over these other modes frequently connect with rail service to provide origin-to-destination through transportation. Thus, all League members have an interest in the U.S. rail industry.

G. Montana Wheat and Barley Committee

The Montana Wheat and Barley Committee ("MWBC") is the producer-funded and directed checkoff organization for wheat and barley growers in the state. The MWBC is attached to the Montana Department of Agriculture for administrative purposes. Wheat and barley are the principal grain crops produced in Montana, and are agricultural resources of the first magnitude in the economy of the state. These commodities enter a domestic and world market that is highly competitive. Therefore, it is the mission of the MWBC to protect and foster the health, prosperity, and general welfare of this industry by encouraging and promoting intensive, scientific, and practical research into all phases of the wheat and barley culture and production, marketing, and end-use and, further, to aid in the development of markets for wheat and barley grown in Montana.

H. The Idaho Barley Committee

The Idaho Barley Commission is a self-governing agency of the State of Idaho that serves to enhance the profitability of the Idaho barley growers through research, market development, promotion, information and education. This is accomplished by identifying and fully utilizing

available resources and organizations to promote and further develop the barley industry in the state of Idaho.

I. The Idaho Wheat Commission

The Idaho Wheat Commission is a quasi-state agency created by wheat producers in 1958. The purpose of forming a grower organization was primarily for the development of overseas markets for Idaho wheat. Today the Idaho Wheat Commission continues to aid in market development as well as investing producer funds into research and providing information and education to the Idaho wheat grower. The Idaho Wheat Commission strives to maximize profitability for Idaho wheat producers by investing funds in market development, research, and information and education.

J. The Washington Wheat Commission

The Washington Wheat Commission ("WWC") is a state agency created by wheat producers in 1958 to fund industry self-help programs through an assessment on each bushel of wheat sold. The WWC allocates assessment funds to programs designed to enhance the production and marketing of Washington wheat. Three major categories of funding include: Wheat Research, Market Development, and Education and Information

K. The South Dakota Wheat Commission

The South Dakota Wheat Commission is a producer funded checkoff organization dedicated to promoting the marketing of South Dakota wheat.

L. The Nebraska Wheat Board

The Nebraska Wheat Board is dedicated to work to increase both domestic and foreign consumption of wheat and wheat food products through marketing and research to help develop and maintain both domestic and export markets for the Nebraska wheat producer. The board will enhance the short- and long-term economic well-being of all Nebraska wheat producers by

investing checkoff funds and participating in programs of market promotion, research, and education.

M. The Oklahoma Wheat Commission

The Oklahoma Wheat Commission is committed to ensuring the competitiveness of Oklahoma wheat in national and international markets. The Commission invests producer contributions in market development through the Wheat Foods Council and U.S. Wheat Associates.

N. The Texas Wheat Producers Board

The Texas Wheat Producers Board & Association are a unique partnership working to protect the future of the Texas wheat farmer. With the combined efforts of the Board and Association, we are able to make a difference throughout the industry, from research and education, to state and national legislation. The Texas Wheat Producers Board is funded by producer checkoff dollars as established by the Commodity Referendum Law.

O. The Colorado Wheat Administrative Committee

The Colorado Wheat Administrative Committee is the producer elected Board of Control which administers the "Colorado Wheat Marketing Order" approved by a referendum of Colorado wheat producers in 1958 pursuant to the "Colorado Agricultural Marketing Act of 1939." Funding for the marketing order is provided by a producer approved assessment which is collected by the first handler. The "Colorado Agricultural Marketing Act of 1939" and the "Colorado Wheat Marketing Order" require that assessment funds be used for sales promotion, public relations and educational programs to increase the consumption and utilization of Colorado produced wheat. Research programs, which improve the marketing and utilization of Colorado wheat, are also authorized.

P. The Alliance for Rail Competition

The Alliance for Rail Competition ("ARC") is a diverse group of shippers and industry trade associations that formally organized in March 1997 in response to growing concerns over deteriorating rail service. Members of ARC include businesses representing a broad cross-section of industry segments, including agriculture, coal, consumer and industrial products, chemicals, minerals and petrochemicals.

II. BACKGROUND TO THIS PROCEEDING

The history of this proceeding is the story of an odyssey. The Board has substantially changed its approach not once, but twice, in attempting to grapple with a perceived problem. A brief review of the genesis of the Board's proposals, the evolution of those proposals, and the comments that were submitted on the proposals over the course of nearly two years is necessary to evaluate the Board's current effort and the Comments of the Interested Associations in this latest proceeding.

A. The Board's March 2007 Original Proposal

On March 29, 2007, the Board issued a Notice of Proposed Rulemaking in Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709,* requesting comments on a proposed interpretation of the term "contract." In its Ex Parte No. 669 NPR, the Board stated that it "seeks public comments on a proposal to interpret the term 'contract' in 49 U.S.C. 10709 as embracing any bilateral agreement between a carrier and a shipper . . . in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of traffic during a specific period or to make specific investments in rail facilities." *Interpretation of the Term "Contract" in 49*

U.S.C. 10709, STB Ex Parte No. 669, at 1 (served March 29, 2007) ["March 2007 Original Proposal"].

The STB's March 2007 Original Proposal was initiated on the Board's own motion and stemmed from the Board's reaction to a complaint filed by the Kansas City Power and Light Company, in which KCPL claimed that it had agreed to certain Powder River Basin coal shipment rates under duress and that its shipment was specifically conditioned on the understanding that those rates were common carrier rates. Indeed, in that proceeding, both KCPL and the involved carrier, the Union Pacific Railroad Company ("UP"), agreed that the involved rates were common carrier rates. Despite that agreement, however, the Board took the position that the document had some of the indicia of a contract, and opined that, if the rates were contract rates, the STB would have no jurisdiction to hear KCPL's rate complaint. *Kansas City Power and Light Co. v. Union Pacific Railroad Co.,* STB Docket No. 42095, at 1 (served July 27, 2006). Subsequently, the Board made a limited finding that, in the circumstances involved, UP's and KCPL's reasonable reliance on agency precedent should govern the STB's decision to exercise jurisdiction. *Kansas City Power and Light Co. v. Union Pacific Railroad Co.,* STB Docket No. 42095, at 3 (served March 29, 2007). On the same day that the *KCPL* decision was announced, the Board also issued its March 2007 Original Proposal, seeking comments on its proposal to define a contract as a "bilateral agreement between a carrier and a shipper."

In the proceeding, shippers generally supported the purpose and aim of the Board's effort, although many shippers had concerns about the means that the Board had chosen. EEI, for example, focused on the need for the Board to determine whether there was a "meeting of the minds" in determining whether there was a contract; it noted that tariffs, unlike contracts, were

typically a unilateral offering by a rail carrier, in which a shipper has no ability to negotiate the rate for that service. EEI Comments, Ex Parte No. 669, June 4, 2007, pp. 4-7. Other shippers questioned the details and definition of the Board's proposal, and raised concerns about carriers' actions to unilaterally dictate the terms of a "contract." See, *e.g.,* NGFA Comments, Ex Parte No. 669, June 4, 2007, pp. 7-8, 10. NITL noted that carriers were beginning to impose on shippers "contracts" that bore all the earmarks of tariffs, i.e., a unilateral offering with terms and conditions set out without negotiation or bilateral agreement, to immunize their activities from Board jurisdiction. NITL Comments, Ex Parte No. 669, June 4, 2007, p. 4. NITL indicated that the Board's March 2007 proposal was "useful," but that the Board should clarify the meaning and scope of the proposal, and particularly should clarify that an arrangement in which there is no bilateral agreement would be considered a tariff. *Id.*, pp. 5-8. Other shippers voiced similar sentiments. See, *e.g.*, E.I. DuPont de Nemours and Company ("DuPont") Comments, Ex Parte No. 669, June 4, 2007, p. 1 (supporting the proposed rule but with modifications to clarify and strengthen); Clay Producers Comments, Ex Parte No. 669, June 4, 2007, p. 3. Shippers also voiced concern that the Board's proposed rule, in proposing to define a "contract," exceeded the Board's jurisdiction[1]; some shipper commenters noted that some of the proposed changes were intended to put the jurisdictional basis of the rule on a sounder foundation, by urging the Board to define a "tariff," rather than define a "contract." See, e.g., Western Coal Traffic League ("WCTL") Comments, Ex Parte 669 No., June 4, 2007, pp. 15-17, 27. In Joint Reply Comments dated August 2, 2007 in Ex Parte No. 669, EEI, NGFA, NITL, the Clay Producers, and other shippers urged the Board to define a "tariff," instead of attempting to define a "contract," an

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[1] Carriers also questioned the Board's authority to define a "contract." See, Comments of the Association of American Railroads, Ex Parte No. 669, June 4, 2007, p. 3; Comments of the Canadian Pacific Railroad, Ex Parte

approach that would be on sounder legal ground, and one which would still meet the Board's stated concerns.

B. The Board's March 2008 Revised Proposal

In a decision served March 12, 2008, the Board noted that "[b]oth shippers and carriers oppose our proposal." *Interpretation of the Term "Contract" in 49 U.S.C. 10709,* STB Ex Parte 669 and *Rail Transportation Contract Under 49 U.S.C. 10709,* STB Ex Parte No. 676, at 2 (served March 12, 2008) ["March 2008 Revised Proposal"]. However, as noted above, many shippers responding to the March 2007 Original Proposal supported the thrust of the STB's effort, but indicated that it needed clarification, and that the jurisdictional basis of the proposal should be put on a sounder footing by defining a "tariff," rather than attempting to define a "contract." Indeed, in another place in its March 2008 Revised Proposal, the Board conceded that shippers supported the thrust but not some of the details of the March 2007 Original Proposal. See March 2008 Revised Proposal, pp. 2, 3 (shippers share Board's concern and shippers welcome clarification as to status of documents that are labeled contracts but which look like tariffs).

Nevertheless, the Board decided to change course radically. It stated that it would pursue its concern about the lack of clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board's jurisdiction "through another means." *Id.*, p. 4. Specifically, the Board instituted another rulemaking to consider imposing two requirements: (1) a "full disclosure statement" that would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that the shipper had a right to request a common carriage rate; and, (2) a "written informed consent"

669, June 4, 2007, pp. 3-4; Comments of CSXT Transportation Company, Ex Parte No. 669, June 4, 2007, p. 4; Comments of the Norfolk Southern Corporation, Ex Parte No. 669, June 4, 2007, pp. 4-6.

requirement that would require the shipper to acknowledge and state its willingness to forgo its regulatory options. *Id.* The Board asked for suggestions as to what language should be included in these full disclosure and written informed consent requirements. *Id.*

In response to the Board's March 2008 Revised Proposal, some shippers supported the thrust of what the Board was attempting to do, but indicated that the Board's proposal still required clarification, or still was on dubious jurisdictional grounds in continuing to focus on contracts. See, e.g., EEI Comments, Ex Parte No. 676, May 12, 2008; Comments of Olin Corporation, Ex Parte No. 676, May 12, 2008; WCTL Comments, Ex Parte No. 676, May 12, 2008, p. 3; Clay Producers Comments, Ex Parte No. 676, pp. 2-4. Other shippers flatly opposed the Board's proposal. See, Comments of PPG Industries, Inc., Ex Parte No. 676, May 12, 2008. Still others opposed the Board's approach and urged the Board to consider the proposal set forth in the Joint Reply Comments of several shipper organizations in Ex Parte 669, discussed above. See, NITL Comments, Ex Parte No. 676, May 12, 2008, p. 3; NGFA Comments, Ex Parte No. 676, May 12, 2008; and Clay Producers Comments, Ex Parte No. 676, May 12, 2008, p. 1.

C. The Board's January 2009 Second Revised Proposal

In its most recent NPR issued on January 6, 2009, the Board basically ignored all of the shipper comments in the record, and instead decided to propose a "somewhat different rule." *Rail Transportation Contract Under 49 U.S.C. 10709,* STB Ex Parte No. 676, at 3 (served January 6, 2009) ["January 2009 Second Revised Proposal"]. Indeed, far from being "somewhat different," the Board's January 2009 Second Revised Proposal proposed yet another substantially new approach. Specifically, in its January 2009 Second Revised Proposal, the Board (1) revised the wording and radically altered the effect of the "full disclosure statement" requirement of its

March 2008 Revised Proposal; and, (2) in what the Board itself acknowledged as a "significant change," dropped altogether the "informed consent" requirement.

In its March 2008 Revised Proposal, the Board indicated that it would consider imposing a requirement that each carrier provide a full disclosure statement. The March 2008 Revised Proposal said nothing about the effect of the statement, or any presumptions that the full disclosure statement would provide. But in its January 2009 Second Revised Proposal, however, the Board proposed to establish a *conclusive* presumption that there is a contract that would oust the Board of jurisdiction when the document at issue contains the "Contract Disclosure Statement" proposed by the Board; but that where a document does not contain that Contract Disclosure Statement, the Board would find jurisdiction absent "clear and convincing evidence" both that the parties intended to enter into a contract and that the shipper was made aware that it could request service under a common carrier tariff. In addition, the January 2009 Second Revised Proposal dropped altogether the "informed consent" requirement set forth in the March 2008 Revised Proposal, indicating that "the informed consent requirement would unnecessarily complicate the contract process and delay the timely implementation of contracts, especially when contracts are negotiated electronically or in the case of signatureless contracts." January 2009 Second Revised Proposal, slip op. at 4.

III. COMMENTS

A. The Board's Proposal Is Legally Flawed Because the Board Has No Jurisdiction Over Contracts Under 49 U.S.C. 10709

In its January 2009 Second Revised Proposal, the Board concedes that it has no jurisdiction over contracts under 49 U.S.C. 10709.[2] *Id.* However, by proposing to *conclusively* find that it will not exercise jurisdiction where a document contains the proposed Contract Disclosure Statement, the Board is in fact determining what is and is not a rail transportation contract under 49 U.S.C. 10709, in direct violation of the statute and applicable Board and judicial precedent to the effect that only the courts have jurisdiction to find what does and does not constitute a contract.

In its January 2009 Second Revised Proposal, the Board proposed to add part 1301 of title 49, chapter X of the Code of Federal Regulations. In support of that proposal, the Board cited as authority 49 U.S.C. 721(a) and 49 U.S.C 10709. Section 721, the first statute cited by the Board, is merely a provision listing the Board's powers with no specific provisions regarding transportation contracts. Courts have held many times that such sections of statutes giving agencies general authority do not override more specific sections of the same statute. See, *e.g.*, *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). The second statute cited, Section 10709 of the Act, authorizes *railroads* to enter into transportation contracts with shippers, and gives the Board no authority over those contracts whatsoever. In fact, Section 10709 makes clear – as does longstanding Board precedent – that the Board, except to the extent

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[2] The Interested Associations assume that the Board's jurisdictional disclaimer is not intended to apply to the jurisdiction conferred on the Board by 49 U.S.C. 10709(d) and (g) over agricultural commodity contracts. The Interested Associations do not mean by their comments herein to support the view that the Board has no jurisdiction over agricultural commodity contracts.

noted in fn. 2 *supra,* has no jurisdiction over transportation by contract, and no jurisdiction to determine what is a contract.

Section 10709(c)(1) specifies that a "contract . . . authorized by this section, and transportation under such contract, shall not be subject to this part." Section 10709(c)(2) further states that "[t]he exclusive remedy for any alleged breach of a contract under this section" shall be a court action, unless the parties otherwise agree. The legislative history of this provision makes very, very clear that the Board is to have *no* jurisdiction to determine any aspect of a contract entered into between a shipper and a rail carrier. See, H.R. Rep. No. 96-1035, 96th Cong. 2d Sess., May 16, 1980, p. 58 [House Report](agency is "without jurisdiction to reject a contract and enforcement of a contract must be in the courts"); S. Rep. 96-470, 96th Cong. 1st Sess., December 7, 1979, p. 9 [Senate Report] (contracts "should be enforceable only in the courts"); H.R. Rep. No. 96-1430, 96th Cong. 2d Sess., September 29, 1980, p. 100 [Conference Report] (contracts are "to be enforced in the courts").

Board precedent is completely consistent with the principle that the Board is to have no role in determining what is or is not a transportation contract. In its decision in ICC Docket No. 39060, *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501* (ICC served March 2, 1983), pp. 2, 3, the Board noted that it would conform its jurisdiction to the precedent set forth in the decisions in *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568 (6th Cir. 1981), and *Burlington Northern Railroad Co. v. I.C.C.,* 679 F.2d 934 (D.C. Cir. 1982), in ruling that, where the existence of a contract was at issue, the precedent would "preclude the [ICC] . . . ruling on the existence of a contract rate . . . ." The ICC noted that it may not "determine the existence and validity of an alleged rate contract." *Id.* See also, *Aggregate Volume Rates on Coal, Acco, UT to Moapa, NV*, 364 I.C.C. 678, 689 (1981); *Kansas*

Power and Light Company v. Burlington Northern Railroad Company, 740 F.2d 780 (10th Cir. 1984).

Thereafter, at least up until the Board's current proceeding, where a party had raised the possibility that a movement was governed by a contract outside of the Board's jurisdiction, the agency conformed to this principle in establishing processes to determine its jurisdiction that preserved the courts' sole role in deciding the existence of a contract. In *Toledo Edison Co. v. Norfolk and Western Ry. Co.,* 367 I.C.C. 869 (1983), the agency established an important burden or proof, namely that "the party raising the contract issue . . . *has the burden of showing the presence or absence of a contract.*" *Id.,* 367 I.C.C. at 872. By placing the burden of proof on the party claiming that a contract ousted the Board of jurisdiction, the Board protected its jurisdiction, but *without* explicitly or even implicitly ruling on the existence of a contract. In *Toledo Edison,* the Board indicated that the party claiming the existence of a contract would, in order to stay the agency's consideration of a matter claimed to be within the jurisdiction of the agency, be required to institute a proceeding in court. In the case at issue in *Toledo Edison*, the ICC also indicated that, "in the absence of a commitment from the defendant [railroad] to pursue this matter in court, there is insufficient evidence to show a *reasonable possibility* that a contract between the parties may have existed. . . . If [the railroad] does not respond or if it states its intent not to proceed judicially, we will resume consideration of this proceeding . . . . we emphasize that this decision does not reflect a conclusion that a contract in fact does not does not exist. That issue has been delegated to the courts by the contract provisions of the Staggers Act." 367 I.C.C. at 872-73 [emphasis added]. Very recently, the Board followed this precedent in noting that "before we will dismiss a rate complaint, the defendant railroad must demonstrate a reasonable possibility that a rail transportation contract governs the movement in question." See,

STB Docket 42099, et al, *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.*, served December 20, 2007, p. 5. Thus, even where no judicial proceeding existed, the *Toledo Edison* test placed the burden on the party claiming the existence of the contract to show that there was a "reasonable possibility" of a contract, and required that party to implement a court action. This correctly preserved the courts' role in deciding the existence of a contract, and correctly placed the burden on the party claiming the existence of a contract in order to oust the Board of jurisdiction over the dispute.

But the Board's current proposal is directly contrary to the statute and this longstanding precedent. Under the Board's January 2009 Second Revised Proposal, the Board will, where a document simply contains the words set forth in the proposed rule, *conclusively presume* that it has *no* jurisdiction – in the proposed rule's own words, the Board "*will not find jurisdiction* over a dispute involving a rate or service under a rail transportation agreement where that agreement contains a disclosure statement that conforms with paragraphs (a) and(b) of this section." See January 2009 Second Revised Proposal, p. 8 (Appendix A, proposed section 1301.1(a)) [emphasis added] But if the Board *conclusively finds* that it lacks jurisdiction simply when "magic words" are used, it can logically *only do so* if it *conclusively finds that a contract does exist* – because the existence of a contract is the *only* grounds for the Board to determine that it does in fact lack jurisdiction. But the *Board cannot lawfully find conclusively that a contract does exist* – because the existence of a contract is a question for the courts.

Indeed, the same flaw is apparent in the Board's January 2009 Second Revised Proposal even when the "magic words" are *not* used in a document. In such case, a party could apparently argue that there is "clear and convincing evidence" that the parties "*intended* to enter into a rail transportation contract." See, *id.* [emphasis added] By its own admission, however, the Board

could apparently find that there is "clear and convincing evidence" that the parties intended to enter into a contract even where magic words are not used. In that case, the Board would again conclusively find that it had no jurisdiction. But that conclusive finding would be on the basis of an adjudication of the parties' intent (i.e., whether there had been a "meeting of the minds") in deciding whether there was a contract or not – the very inquiry that is, under black-letter law, the statute, and the Board's own precedent, at the heart of contract formation. *Restatement (Second) of Contracts, Section 202; Kansas Power and Light Company,* 740 F.2d at 785; see generally, EEI Supplemental Reply Comments, Ex Parte No. 669, August 2, 2007, p. 5, note 4. Thus, even where "magic words" are not used, in the presence of what the Board believes is "clear and convincing evidence," the Board would improperly be adjudicating the existence of a contract.

Given the fact that the courts, and not the Board, are given authority to determine the existence of a contract, the Board's jurisdiction to determine its own jurisdiction cannot be founded on the conclusive presumption that it has no jurisdiction on the grounds that there is a contract. Rather, the Board must focus *only* on the conceded subject of its jurisdiction, namely, what is a *common carrier tariff*, and whether a *common carrier tariff exists* in the case at hand. This is the approach that many shipper comments have been urging the Board to take since the very beginning of this proceeding, but the Board has steadfastly ignored those arguments and suggestions.[3] The statute and Board precedent are clear that the Board has no jurisdiction to

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[3] Comments of Ameren Energy Fuels and Services Company ("Ameren"), Ex Parte No. 669, June 4, 2007, p. 2, 5-6; Comments of Dairyland Power Cooperative ("Dairyland"), Ex Parte No. 669, June 4, 2007, p. 6; Comments of Entergy Services ("Entergy"), Ex Parte No. 669, June 4, 2007, p. 8; WCTL Comments, Ex Parte No. 669, p. 13-17; Reply Comments of American Electric Power Cooperative ("AECC"), Ex Parte No. 669, August 2, 2007, p. 1; Joint Reply Comments of EEI, NGFA, NITL, Clay Producers, AECC, DuPont, Ex Parte No. 669, August 2, 2007, p. 3; EEI Supplemental Reply Comments in Ex Parte No. 669, August 2, 2007, p. 2, 4; NGFA Reply Comments, Ex Parte No. 669, August 2, 2007, pp. 6-9; NITL Reply Comments, Ex Parte No. 669, August 2, 2007, pp. 3-4; NITL Comments, Ex Parte No. 676, May 15, 2008, p. 8; NGFA Comments, Ex Parte No. 676, May 15, 2008; Clay Producers Comments, Ex Parte No. 676, May 15, 2008, p. 2, 4; WCTL Comments, Ex Parte No. 676, May 15, 2008, p. 2.

determine the existence of a contract, and the Board's current proposal does not meet the requirements of the statute.

B. The Board's Proposal Is Inconsistent with Congressional Intent and Sound Public Policy Because It Would Conclusively Deem a Document To Be A Contract In the Absence of Shipper Negotiation or Assent

In authorizing contracts, the Staggers Act contemplated that shippers and carriers would freely negotiate and agree upon customized arrangements for their mutual benefit. The House Report, for example, noted that "[r]ail carriers and shippers *should be free to negotiate and enter into contracts* . . ." without concern over regulatory interference. House Report, p. 58 [emphasis added]. Contracts were not to be required or forced upon shippers, but rather were to be encouraged. Conference Report, p. 98 (contract provision was developed "to encourage carriers and purchasers of rail service to make widespread use of such agreements"); Senate Report, p. 26 ("the contract provision of the bill is intended to encourage contracts while providing necessary protections for small shippers . . . ."). Congress clearly contemplated that contracts would be negotiated to have benefits for both parties. House Report, p. 56 (contracts would "serve both shippers' and rail carriers' interests . . . ."); Senate Report, p. 24 (contracts would give carriers assured levels of revenue but at the same time assure shippers of specified levels of service at known rates). Indeed, Congress explicitly recognized that some shippers would not, or could not, enter into freely negotiated contracts. For those shippers, the protections of the act would be fully available. Conference Report, p. 100 ("[s]hippers who do not elect to enter into contracts, or are unable to do so, are assured that carriers will have the same common carrier obligations as in existing law"); House Report, p. 57 (retention of the common carrier obligation is necessary where there are contracts to protect shippers with little bargaining power).

However, the Board's proposal is utterly inconsistent with this Congressional intent, as it would legitimize and facilitate "take it or leave it" contracts and other one-sided practices

contrary to sound public policy. Throughout this proceeding, shippers noted that carrier "contracts" have been increasingly in the form of "take it or leave it" documents, many of which look like tariffs comprised of unilateral offers, containing rates that can be changed on very short notice, without signatures, and "accepted" only by tendering traffic.[4] The Board, while recording those facts in its decision, see March 2008 Revised Proposal, p. 3 and January 2009 Second Revised Proposal, p. 6, has refused to even begin to consider the implications of those facts for its proposals.

As discussed further below, under the Board's proposal, *any* document that contains the "magic words" set forth by the Board effectively becomes a contract outside of the Board's jurisdiction, regardless of whether the "contract" document is discussed, negotiated, or signed, and regardless of whether there is even assent or any "meeting of the minds" at all.[5] This is because, once the carrier uses the "magic words" set forth by the Board, the carrier bears *no* burden of proof as to the nature of the document, and the Board will conclusively refuse to find jurisdiction, thus forcing the shipper to contest the matter in court. Shippers have no say in the matter at all – once the "magic words" are invoked by the carrier, and once the shipper uses the rate, then the document effectively becomes a contract in the absence of shipper negotiation or even assent to the "contract." The Board's proposal, then, is entirely one-sided, and incorrectly places the burden of showing the existence of a contract, *not* on the party making that claim, but *always* on the shipper, the party that, in the large majority of cases, would be the party who has made a claim before, and sought the jurisdiction of, the Board. Moreover, as discussed further below, the Board's proposal would force the shipper to go to court to *disprove* the carrier's

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4 See page 24 *infra.*

5 As noted in note 1 above, a "meeting of the minds" is fundamental to contract formation.

unilateral claim, a procedure that effectively eliminates the shipper's right to the Board's jurisdiction.

The Board's proposal thus allows rail carriers to determine for themselves, and without negotiation or shipper assent to the nature of the document as a contract, whether the transportation that they provide will be subject to regulation, and would subject shippers to the consequences of such an outcome, merely because they shipped under the carrier's unilateral document. But a shipper may have no choice but to ship via the carrier, given the market-dominant nature of a significant amount of rail transportation and the dependence of many shippers to transport via rail in order to operate their businesses.

Under the statute, the "default" position is *common carriage*: contracts are an *exception* to the Board's jurisdiction. But the Board's proposal turns the statutory scheme on its head. With the simple addition of "magic words" to a document that is in all other respects a tariff, and without negotiation, discussion, or even the shipper's assent, the ordinary scheme of transportation becomes contract carriage outside of the Board's jurisdiction. Congress in the Staggers Act did not contemplate such a wholesale abrogation of the Board's statutory jurisdiction. The Board's proposal is not consistent with Congressional policy or statutory intent, and this rulemaking should therefore be terminated.

C. The Board's Proposal Fails to Recognize the Changes That Have Taken Place in the Rail Marketplace Since the Passage of the Staggers Act, and Would Facilitate Unfair Carrier Behavior

The Board's consideration of its proposal from the start has been operating on the assumption that the rail marketplace within which contracting takes place is the same marketplace that the agency confronted in the years immediately after passage of the Staggers Act. But this is not true. In 1980, the year that the Staggers Act was approved, there were over forty Class I carriers. Today, there are only seven, with the largest four moving 95% of all rail

traffic. Dairyland Comments, Ex Parte No. 669, June 4, 2007, p. 5; see also, Ameren Comments, Ex Parte No. 669, June 4, 2007, p. 6. A recent study commissioned by the Board itself found that significant numbers of shippers are captive to their carriers; that nearly one fifth are paying rates that exceed three hundred percent of variable costs; that rail rates have been increasing by significant percentages in recent years; and that carriers east and west of the Mississippi have evolved into regional duopolies. See, *Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, dated November 2008, by Laurits R. Christensen Associates of Madison, Wisconsin[6]; see also, WCTL Comments, Ex Parte No. 669, June 4, 2007, pp. 9-10. Aggravating this increased structural power of rail carriers in the rail transportation marketplace is the fact that capacity on the railroad system has been increasingly constrained, giving even more leverage to market-dominant carriers in any discussion about rates and services. See, Entergy Comments, Ex Parte No. 669 June 4, 2007, pp.5-6.

In this and other recent proceedings, shippers have thoroughly documented unfair and one-sided pricing and "contracting" practices that have flowed from this increased carrier market power. The comments in this proceeding show that "take it or leave it" pricing and service terms are widespread[7]; that "bundling" is prevalent[8]; that carriers are refusing to quote, or making it difficult for shippers to obtain, tariff rates[9]; and that carriers are calling documents a "contract"

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[6] See, *e.g.*, Christensen Study, pp.ES-5, 11, 15; and pp. 2-11, 8-7, 8-13, 8-13 to 15, 8-53 to 54, 9-29, 10-11 to 10-12, 11-9 to 11-10;

[7] AECC Comments, Ex Parte No. 669, June 4, 2007, pp. 5-6; EEI Comments, Ex Parte No. 669, June 4, 2007, pp. 5-6; Entergy Comments, Ex Parte No. 669, pp. 6-7; NGFA Comments, Ex Parte No. 669, pp. 11-13; Clay Producers Comments, Ex Parte No. 669, June 4, 2007, p. 2; WCTL Comments, Ex Parte No. 669, p. 7; Comments of PPG Industries, Inc. ("PPG"), Ex Parte No. 676, May 12, 2008, p. 5.

[8] Comments of Occidental Chemical Corporation ("OxyChem"), Ex Parte No. 676, May 12, 2008, p. 2; EEI Comments, Ex Parte No. 676, May 12, 2008, p. 4; Olin Comments, Ex Parte No. 676, May 12, 2008, p. 3.

[9] OxyChem Comments, Ex Parte No. 676, May 12, 2008, p. 2; NITL Comments, Ex Parte No. 676, May 12, 2008, p. 7.

when they are unilateral tariff quotations that can be changed at virtually any time at the carrier's sole discretion.[10]

The Board has dismissed these serious concerns as merely "ancillary." January 2009 Second Revised Proposal, pp. 6-7. But they are not "ancillary" – in fact, these concerns go to the heart of the flaws in the Board's proposal. The effect of the Board's proposal would facilitate these abusive practices, because by simply using "magic words," the carrier can effectively shield all these practices from regulatory scrutiny. The fact that the shipper would have a theoretical possibility of going to court to challenge the "contract" as never being formed because of a lack of a meeting of the minds, or as a contract of adhesion, would provide no benefit to the parties whatsoever and is massively inefficient. Even if a shipper would go to court to try to disprove the existence of a contract, or to prove that there had been a contract of adhesion, what would it gain? This "remedy" would come a year or more after the carrier imposed the "contract," and would merely permit the carrier to impose an even higher tariff rate. The Board's proposal does not permit shippers to obtain an STB decision that a document is in fact a tariff and therefore within the STB's jurisdiction, without having to go to court to disprove the Board's conclusive presumption that the document is a contract. A shipper's access to the Board must be available immediately, and it should be the carrier, not the shipper, who should bear the burden of proof.[11]

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[10] DuPont Comments, Ex Parte No. 669, p. 2; NITL Comments, Ex Parte No. 669, June 4, 2007, pp. 3-4, 8; Clay Producers Comments, Ex Parte No. 669, June 4, 2007, p. 2; PPG Comments, Ex Parte No. 676, May 12, 2008, p. 5; NITL Comments, Ex Parte No. 676, May 12, 2008, p. 7.

[11] The Board's deletion of the "informed consent" requirement set forth in its March 2008 Revised Proposal makes a very bad situation even worse, since it is now solely the carrier that can determine "conclusively" whether the document is a contract outside the Board's jurisdiction, and the shipper cannot even contest that through a refusal to sign the "informed consent" statement.

D. The Current Rapidly Changing Economic and Administrative Environment Should Prompt the Board to Terminate This Proceeding and Fundamentally Reevaluate Its Current Proposal

The current rapidly changing economic and administrative environment should prompt the Board to fundamentally reevaluate its current proposal. American manufacturing has been devastated by the current economic crisis. There is no shortage of dire statistics. For example, it has been just reported that business spending and investment dropped at a 12.3 percent rate in the fourth quarter of 2008; exports fell at a nearly 20% annual rate. Wall Street Journal, February 1, 2009, "Economy Dives as Goods Pile Up," p. A-2. Profits decreased 38% for the 208 companies in the S&P 500 that have released fourth-quarter earnings reports since the beginning of January 2009. Washington Post, February 1, 2009, p. F6. However, although traffic has recently begun to decline on the nation's rail carriers, carriers are still performing relatively well financially and their financial outlook is still solid.[12] Given the serious and rapidly-changing economic environment, the Board should not be doing anything to negatively impact shippers' position vis-à-vis their rail suppliers.

Moreover, the administrative environment is changing as well. On January 20, President Obama's chief of staff directed agency heads to halt rulemakings and submissions to the Federal Register until incoming Obama administration officials had a chance to review any proposed rules. The President's Office of Management and Budget has indicated that the Board's current Notice of Proposed Rulemaking in this proceeding is technically not covered by the rule, but

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[12] On January 27, 2009, NS reported that it had set fourth quarter records in railway operating revenues; income from railway operations, net income, earnings per share, and operating ratio and set a number of records in 2008. Canadian Pacific and Canadian National both had solid fourth quarters, beating analysts' estimates. "Canadian Pacific Railway: Solid 4Q and Pricing Outlook," Thomas R. Wadewitz, January 28, 2009, J.P Morgan Research; Canadian National Railway: Significant Upside 4Q: Meaningful Cost Reduction Opportunities; Raising EPS," Thomas R. Wadewitz, January 23, 2009, J.P. Morgan Research. Union Pacific turned in a solid fourth quarter. "Union Pacific: Upside 4Q; Pricing and Productivity Momentum Remain Intact," January 22, 2009, Thomas R. Wadewitz, J.P. Morgan Research.

press reports indicated that OMB encouraged the agency "to follow the spirit of the memorandum." Platts Coal Trader, January 27, 2009, "STB will continue with rulemakings."

In this situation, the Board should stay its hand until policymakers have had a chance to evaluate the proposal in light of the current economic and administrative situation.

IV. CONCLUSION

These Interested Associations believe that most shippers would not oppose the possibility of the Board developing a reasonable and realistic definition of a tariff, and/or developing reasonable and realistic presumptions or burdens of proof to provide a safe harbor to parties freely entering into negotiated agreements. Unfortunately, the Board's proposal does not meet these standards.

In such a situation, where the agency itself has clearly been uncertain of the correct approach to a problem in a proceeding that the agency advanced on its own initiative; where the various "solutions" proposed by the agency have been the subject of widespread criticism; where the latest iteration sets forth substantial changes; where the latest Board proposal is inconsistent with the statute, Congressional intent and sound public policy and is one-sided and unfair; and where the economic, political and policy environment counsels that the Board should stay its hand, the Board should terminate this proceeding.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.
EDISON ELECTRIC INSTITUTE
THE FERTILIZER INSTITUTE
THE NATIONAL GRAIN AND FEED ASSOCIATION
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
MONTANA WHEAT & BARLEY COMMITTEE
IDAHO WHEAT COMMISSION
IDAHO BARLEY COMMISSION
WASHINGTON WHEAT COMMISSION

SOUTH DAKOTA WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
ALLIANCE FOR RAIL COMPETITION

By their representatives,

Vincent P. Szeligo
Wick, Streiff, Meyer
O'Boyle & Szeligo
1450 Two Chatham Center
Pittsburgh Pa 15219
Attorney for the U.S. Clay Producers Traffic Association, Inc.

Thomas Schick
Senior Director
American Chemistry Council
1300 Wilson Blvd.
Arlington, VA 22209

Scott Stone
Patton, Boggs and Blow
2550 M. St. N.W.
Washington, D.C. 20037
Attorney for the American Chemistry Council

Michael F. McBride
Van Ness Feldman P.C.
1050 Thomas Jefferson St. N.W., Suite 700
Washington, D.C. 20007
Attorney for The Edison Electric Institute

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney and Harkaway
2175 K St. N.W.
Washington, D.C. 20006
Attorneys for The National Grain and Feed Association

Nicholas J. DiMichael
Karyn A. Booth
Jeffrey O. Moreno
Thompson Hine LLP
1920 N. St. N.W.
Washington, D.C.
Attorney for The Fertilizer Institute and The National Industrial Transportation League

Mr. Terry Whiteside
Whiteside and Associates
3203 3rd Ave. North, Suite 301
Billings, Montana 59101
Representative of Montana Wheat & Barley Committee, Idaho Wheat Commission, Idaho Barley Commission, Washington Wheat Commission, South Dakota Wheat Commission, Nebraska Wheat Board Oklahoma Wheat Commission, Texas Wheat Producers Board, Colorado Wheat Administrative Committee Alliance for Rail Competition

Due and dated: February 5, 2009

CERTIFICATE OF SERVICE

This is to certify that on this 5th day of February, 2009, a true and correct copy of the foregoing Comments were served upon all parties of record via first class mail, postage pre-paid.

Nicholas J. DiMichael